No. 97-126

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JEAN G. MATTERN,

Petitioner,

v.

EASTMAN KODAK COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

(1) The parties are not in disagreement regarding the substance of the Fifth Circuit's interpretation of the scope of § 704(a). We set forth in the petition (at 7-8) twelve distinct retaliatory practices expressly declared lawful by the court of appeals. Respondents do not deny that under the decision below all of these practices may now lawfully be used in the Fifth Circuit to punish employees who complain to or cooperate with the EEOC.

The application of the Fifth Circuit rule to the instant case is also not in dispute. Respondents admit (Brief in Opposition at 6) that the jury charge defined an "adverse employment action" prohibited by § 704(a) to include, *inter alia*, "acts of sabotage . . . by employees against other employees." Contrary to respondents' assertion (*id.*, p. 5), therefore, the jury was not limited to considering "separately each alleged retaliatory action."[1] Instead, as respondents acknowledge (*id.*, p. 4), based upon all the proof the "jury found 'that Eastman intentionally or willfully retaliated against Jean Mattern for filing a charge of discrimination and/or for filing this lawsuit'" and awarded Mattern $50,000 in actual damages. Like respondents, the court of appeals did not question that factual finding, and neither respondents nor the court below suggested that the damage award was in any respect excessive.

Thus, this case presents an entirely appropriate vehicle for addressing the issue raised in the petition. That respondents acted with an unlawful retaliatory motive, and that their actions caused substantial injury, are no longer in dispute. The specific retaliatory practices on which the jury

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[1]Whether the retaliatory practices at issue in this case were assessed separately, or in combination, is in fact irrelevant. Under the Fifth Circuit decision that distinction is unimportant; since on its view none of the practices at issue was illegal, a combination of entirely lawful retaliatory actions would be no less permissible.

verdict was based provide a specific and concrete application of the Fifth Circuit's "ultimate employment action" doctrine.

(2) Respondents do not contend that any other circuit has ever held, or would hold, that the dozen retaliatory practices sanctioned by the Fifth Circuit are permissible under Title VII. Nor do respondents argue that any circuit has ever held that practices causing $50,000 in damages are too minor to be actionable under Title VII. In its actual operation, then, as indicated by the result below, the Fifth Circuit rule differs dramatically from actual practice in the other circuits.

Respondents argue solely that other circuits hold that any alleged discriminatory act is only actionable if that act is adverse to the plaintiff, *i.e.*, that the act in question must actually cause some injury. *See* Brief in Opposition, pp. 11 ("the law requires a plaintiff in an employment discrimination case to show some actual injury"), 14 (action complained of must cause a "materially significant disadvantage"), 15 ("materially adverse change in the terms and conditions of employment"), 24 (Congress did not authorize actions for "trivial slights, real and imagined"). The cases relied on by respondents require proof of actual injury. *See, e.g.*, *Adams v. Bethlehem Steel Corp.*, 736 F.2d 992, 994 (4th Cir. 1984)("the existence of a wrong without some identifiable injury does not provide a basis for redress").[2]

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[2] *Accord Harlston v. McDonnel Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994) ("[c]hanges in duties or working conditions that cause no materially significant disadvantage" are not actionable); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994) (no claim can be based on employment actions that involve "no materially significant disadvantage"); *Lawrence v. National Westminster Bank N.J.*, 98 F.3d 61, 72 (3d Cir. 1996) (claim dismissed because "the district court found [plaintiff] had suffered no injury").

But the common rule that a civil rights plaintiff must prove some actual, non-trivial injury is dramatically different from the holding in this case—that an entirely real, $50,000 injury is not actionable if brought about through one of the "approved" methods of retaliation. The Fifth Circuit did not hold that a $50,000 injury is trivial or *de minimis*; such an injury would, on its view, have been fully compensable if caused, for example, by a retaliatory *dismissal*. The court of appeals overturned the jury verdict in this case, not because of any dispute about the magnitude of the harm, but because it insisted that the particular retaliatory methods utilized to inflict that harm simply were not illegal under Title VII.

(3) The Fifth Circuit itself emphasized that the rule it was adopting for retaliation cases was deliberately and dramatically different from the requirement in a garden-variety race or gender discrimination case that a plaintiff prove actual injury. The court below insisted that the scope of the prohibition against mistreatment of an employee on the basis of race or sex—encompassing *any* practice with an adverse effect—"reaches much further than" the Title VII anti-retaliation provision. (Appendix to the Petition, p. 14a.) The Title VII prohibition against adverse action taken on the basis of race or gender, the Fifth Circuit held, forbids any number of "vague harms" that are entirely permissible when engaged in to retaliate against an employee for filing a charge of race or sex discrimination. (*Id.*)

That the decision below marks a sharp departure from prior precedent is well recognized. One recent opinion observed, for example:

> the Tenth Circuit . . . has not adopted the *Mattern* standard. . . . In fact, the Tenth Circuit . . . has repeatedly permitted claims for retaliation based upon less than an "ultimate employment decision" as defined in *Mattern*. . . . Were some discriminatory acts that had a real and negative effect on a person who brings a charge of discrimination under § 2000e-

> 2(a) permitted, it would have a chilling effect upon employees' willingness to make charges or support others' charges under that section.

Deavenport v. MCI Telecommunications Corp., 1997 WL 46160, *4, *7 (D. Colo. Aug. 13, 1997). Even within the Fifth Circuit it is candidly recognized that *Mattern* has brought about a "contraction" of the protections of Title VII. *Battee v. Eckerd Drugs, Inc.*, 1997 WL 340941, *8 (N.D. Tex. June 12, 1997).

Respondents concede that "judges . . . have differed about where to draw the line between actionable conduct and conduct that simply does not constitute 'discrimination against' an employee." (Brief in Opposition 12; *see id.* at 14 (Seventh Circuit decisions "inconsistent"), 19 (Ninth Circuit decisions "inconsistent"), 20 (District of Columbia Circuit "sets one of the lowest thresholds").) The conflict is acute and must be resolved by this Court.

(4) It simply is not the case, as respondents suggest, that the jury instructions in this case anticipated or incorporated the aberrational standard adopted by the Fifth Circuit. None of the twelve now-permissible retaliatory practices approved by the Fifth Circuit are described by the jury instructions as lawful. To the contrary, the jury instruction specifically states, for example, that a retaliatory "reprimand" would be actionable (Appendix to the Petition, p. 10a), while the court of appeals expressly held that such a reprimand was not actionable. (*Id.*, p. 12a.) If the district judge had understood his jury instructions to declare lawful every retaliatory act with which respondents were charged, he would assuredly have granted respondents' motion for a judgment as a matter of law. Similarly, if the jury had understood the instructions to mean that all the proffered evidence was legally insufficient, it would not likely have returned a substantial verdict in favor of plaintiff.

Equally unavailing is respondents' argument that the jury's verdict regarding retaliation is inconsistent with its

verdict regarding sexual harassment. If the jury verdicts were indeed inconsistent, the proper remedy would have been to order a new trial on both issues. But the Fifth Circuit did not order such a new trial.

Respondents misapprehend the scope of the Question Presented when they suggest that petitioner has abandoned her objection that company officials permitted fellow workers to sabotage petitioner's work. The Question Presented is specifically framed to encompass retaliatory acts taken by fellow employees "with the knowledge of company supervisors." (Petition for a Writ of Certiorari, i.)

At trial, to be sure, a wide array of factual disputes existed between the parties, and were presented to the jury. With regard to petitioner's retaliation claims, however, the jury resolved those issues in petitioner's favor. The issue squarely presented is, therefore, whether the court below was justified in setting aside the jury's verdict.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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